Boston College Law Review

Volume 11
Issue 4 *The Federal Regulatory Agencies During The Decade Of The 1960's A Symposium*

Article 2

5-1-1970

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BOSTON COLLEGE
INDUSTRIAL AND COMMERCIAL
LAW REVIEW

VOLUME XI | MAY 1970 | NUMBER 4

THE FEDERAL REGULATORY AGENCIES IN PERSPECTIVE: ADMINISTRATIVE LIMITATIONS IN A POLITICAL SETTNG

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The independent administrative agency has been the whipping boy of the American governmental establishment for the last 20 years. The usual complaint—at the moment very much emphasized by those pressing for environmental controls—is that these agencies become willy-nilly the "captive" of the industries which they are charged with regulating. President Nixon's recent proposal to consolidate all administrative powers relevant to environmental control into a new independent agency will probably raise once again questions as to the effectiveness of the agencies. This Symposium reviewing the work in the last decade of six agencies and of the antitrust division of the Department of Justice provides useful material for the debate.

In 1954 in an article entitled *The Effective Limits of the Administrative Process: A Reevaluation*,[1] I attempted to make an estimate of the role of the administrative process particularly as it is exemplified in the independent agency. I came to the conclusion, among other things, that the charge of industrial or corporate domination of the agencies was a gross exaggeration. But it has been very difficult to counter the kind of simplistic thinking which is involved in the claim. It has been many times pointed out that American liberal and reform thinking relies heavily on the so-called "devil" theory. The commonest form of this theory is to attribute the ills of our society to the large corporations. A subsidiary of the axiom is that when an attempt is made to control the corporations by a public agency the agency is captured by them. Such co-option can no doubt take place and has in particular instances taken place. Indeed, a certain degree of co-option

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[1] Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105 (1954).

is inherent in the whole process of regulation. And the more inclusive and detailed the regulatory scheme the more this will be true.

The less loaded word for the phenomena of "capture" is cooperation. Two reasons can be given for both the likelihood and even the propriety of cooperation. The first reason is indeed basic to all legal systems. A legal system cannot function unless there is a high degree of symbiosis, of living together and of acceptance. Where the enforcement of law requires the continuous imposition of sanctions against a hostile constituency the enterprise is apt to fail. Second, where regulation is intensive it inevitably tends to usurp the function of management. A government administration will not have the resources for managing the large enterprises which it regulates, and in fact it is under no responsibility for a successful issue. If, nevertheless, regulation is carried to the point where private managerial initiatives are seriously impaired, the enterprise will be robbed of its necessary drive. It may be surmised that this is what has happened to the railroads. Indeed, a much greater danger to effective administration than "capture" is the hardening of administrative policies and the resulting inflexibility. This, in the opinion of many critics, is the case with the Interstate Commerce Commission.

It is I think impossible to make out that the ICC has been captured by anything other than its own rather rigid approach to rate competition. It is one of the ironies of the debate on this whole subject that it arose originally out of the hypothesis that the ICC had been captured by the railroads and that the hypothesis was proposed at the time when the Commission was putting road-blocks in the way of effective railroad competition with automobile trucking. The simplistic approach would have told us to substitute the trucks for the railroads as the captor. But the true analysis, I think, was that the Commission had developed a so-called planning notion, then very popular, pursuant to which the entire transporation industry was to be coordinated. Each mode of transportation was to have its "share".

There is, I think, an argument for the abolition of the Interstate Commerce Commission—though I dare say this approach too is oversimplified. At least the contribution to this Symposium discussing the ICC does nothing to counter the argument for abolition. It shows a Commission still committed to hampering the railroad's ability to compete by imposing upon its rate structure the theory of fully distributed costs, and for the rest engaged in a kind of caretaker regulation of a nearly bankrupt railroad industry. Much of the Commission's energies these days have been devoted to approving or disapproving (but mostly approving) railroad consolidations. It is questionable whether this work requires the service of a standing regulatory commission. One has

the uneasy feeling that the consolidation movement is a kind of desperate make-shift. Given the absence of any coherent transporation policy I hasten to add that if these observations appear as a criticism of the ICC they imply to a far greater degree a criticism of the failure of our government as a whole to evolve a coherent transporation policy.

My estimate of the railroad regulation situation is only another expression of my abiding conviction that the criticisms so often made of administrative agencies should much more often be directed toward Congress than the agencies. The notion so sedulously cultivated by many of us during New Deal days that agencies, because they were expert, could go on spinning out of their own guts a continuing series of miraculous solutions was an absurd and a-historical illusion. The stuff of great public policy controversies is basically political and can only be solved in the political arena.

It is true that in the absence of a congressional solution, particularly where opposing forces are in stalemate, an administrative agency with a broad delegation of power does have some leverage with which a brilliant and energetic administrator can solve problems. And, contrary to the jaundiced views taken of the agencies, the fact of the matter is that there have been in the past, and indeed in the recent past, some striking examples of this phenomenon. Even so maligned an agency as the Federal Communications Commission has provided us with some striking examples, as witness its application of the fairness doctrine to require its licensees to broadcast a substantial volume of anti-cigarette propaganda.

The Symposium provides considerable material for demonstrating that the "capture" hypothesis is based on a false premise, either explicit or implied, which among other things obscures the diversity of administrations both of the independent and the departmental variety. The treatment of the independent agency as a distinct phenomenon has gone much too far and has confused thinking in the area. The independent agency does have certain distinct characteristics. Its so-called independence—which is technically an independence from the constitutional Executive—has often been thought to weaken rather than strengthen it. Lacking presidential backing the agency may be forced into undue dependence upon Congress and its committees. Furthermore, it is thought that the desire for favorable budgetary treatment and for reappointment to positions does introduce a measure of presidential control. Nevertheless, certain agencies, of which the SEC is an outstanding example appear to have maintained a very large independence.

One of the defects of the capture theory is the premise that the object of regulation is always a more or less gigantic corporate com-

bination to whose pressure and power the agency is predominately subject. This of course is a simplified derivative of the classic Marxian analysis. It either overlooks or denies the fact that even granting the very great power of the industrial corporations there are other groups, some of them organized and some not, which demonstratively possess a very great power. The farm and union organizations are prime examples. The article on the National Labor Relations Board documents the proposition that union pressure for the extension of union bargaining is persistent and effective, though one should make no claim that it is the only force to which the Board is responsible. The Securities and Exchange Commission, however, amply testifies to the power of the unorganized investor interest. The Federal Power Commission, as it appears from the article describing its recent activities, has been quite responsive to consumer pressure, perhaps, as recent events suggest, to the point where it has failed to allow returns to the industry sufficient to maintain the needed level of exploration and investment.

It may be argued that the FPC's present sensitivity to the consumer interest is in part due to the prodding of the Supreme Court. That, I think, is true. But it in no way impairs my general point which is that it is a mistake to isolate the institution of the administrative agency from all of the other relevant forces and institutions, and then to characterize it as inevitably the captive of certain interests. Even a theory which accounts for agency action in terms of power must take account of the fact that each agency operates within a complex of powers which is peculiar to that agency, and that even for any single agency there is rarely a single interest which can dominate. The Maritime Board, for example, which is indeed a power ridden agency, is at least accessible to two sources of power—the unions and the shipping owners.

The present day reformist, particularly the environmentalists, look to the courts to achieve their aims. In the New Deal days when I first went into government the courts were looked at as inherently the bulkwarks of reaction. We know that that was untrue and so should have learned that such generalizations are likely to be wrong, including the generalization that administrations are inherently reactionary and at the beck and call of the interests. It is true that the work done by the courts in the last few years in the area of administrative law has been of the greatest importance for the cause of reform. In a period in which many of the agencies have settled into unenterprising routines, the courts have set about to reawaken these agencies to their responsibilities for active and forward-looking decisions. Particularly significant are the decisions opening up the agency and judicial review proceedings to the direct representation of consumer and citizen inter-

ests. Theoretically these interests are in the keeping of the agencies themselves. But bureaucracies tend to become somewhat ingrown, attached to their own concepts of policy and resentful of outside pressures, particularly those which they feel they can ignore.

The courts also have been broadly interpreting their law-making powers through the vehicle of statutory interpretation, and have mandated more inclusive concepts of policy than the agencies were prepared to accept. Perhaps we might say of the phenomenon that the courts have a more general fund of prestige out of which to build novel theories, though agencies with bright new mandates have in the past been as enterprising as the courts. These judicial activities continue to be of great importance in stimulating and guiding the agencies in their new endeavors. But ultimately the conflict of interests which lie at the bottom of most of the great controversies must be resolved by the more particular political process represented by administrative and legislative power. The courts are not equipped, for example, to work out pollution control standards for the Delaware River Basin.

We are not entitled at this point to assume that because in the past agencies have had little regard to environmental protection they will continue in that way in the future. The political situation has radically changed. There is now a large public demand which it would be suicidal for the agencies to ignore and which finds expression in important new legislation as well as in an aroused public opinion. To such pressures the agencies responded in the past, and there are no a priori reasons why they should not respond to such forces in the future. This is not to say that every claim made by the environmentalist will be accepted. There are real conflicts on every side of which there are ranged great numbers of our citizenry. Pollution control is as much as anything a matter of increased costs and it is the citizen who will foot the bill.

The articles of this Symposium testify to the fact that however we may estimate the value of the decisions taken by these agencies they are not necessarily bogged down in routine or oblivious to new problems. The article on the Federal Power Commission demonstrates that once catapulted by the Supreme Court into the business of regulating the producer price of natural gas, and having been criticized by Dean Landis for their failure to respond to the challenge, they have become most ingenious and flexible in designing theories to meet the administrative load. The much maligned Federal Communications Commission has been extremely active in the last few years. Given the massive failure of Congress, for example, to provide guidance for the resolution of the CATV problem, the Commission has put out an enormous and continuing effort in dealing with this baffling and explo-

sive issue. The continuing initiative of the Securities and Exchange Commission, its ready response to old and new problems in the area of investment, is highly encouraging. The National Labor Relations Board, whatever ones feeling as to its biases, has not stood still.

These instances demonstrate that the independent agencies, just as it is true of the departmental agencies, are capable of novel and significant initiatives. When compared with the Congress they do not, I think, come off a poor second; and it is difficult to argue that their failures have been more drastic than those of either Congress or the Executive. The courts today, of course, are the darlings of the liberals but they have not always been so. In sum, any theory which attempts to describe our administrative agencies, whether independent or departmental, in tight or simplistic terms is doomed to fail. In any ultimate sense they can only be understood as functions of our entire system of government and evaluated in terms which are relevant to a judgment of that system.